Supreme Court, U.S.
FILED

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No. 99-____

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES O. ROBINSON AND
BELINDA TAYLOR,

Petitioners,

v.

SHERIFF OF COOK COUNTY,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When class certification is sought in a Title VII disparate impact by a plaintiff who had filed a timely class charge of discrimination with the EEOC,

1. May a district court rely on its assessment of the strength of the individual plaintiff's claim to deny class certification?

2. May a member of the putative class, who had not filed her own EEOC charge, join in a timely filed action arising from a class charge of employment discrimination, either

    a. To pick up the gauntlet of class representative and litigate claims of disparate impact discriminaton for herself and for the class of persons similarly situated, or,

    b. To litigate her individual claim of discrimination?

3. Must an employer, who seeks to answer a *prima facie* case of disparate impact discrimination, do more than articulate a facially valid reason for its failure to hire?

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PETITION FOR WRIT OF CERTIORARI

Petitioners Charles O. Robinson and Belinda Taylor respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on February 8, 1999.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-7) is reported at 167 F.3d 1155 (7th Cir. 1999). The opinions of the district court (App. 9-13, 14-20) are unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals (App. 7) was entered on February 8, 1999; petitioners' timely petition for rehearing was denied on March 18, 1999. (App. 8.)

STATUTE AND RULE INVOLVED

This case involves 42 U.S.C. §2000e-2(k)(1)(A)(i) which provides as follows:

> (1)(a) An unlawful employment practice based on disparate impact is established under this subchapter only if—
>
> > (i) a complaining party demonstrates that a respondent uses a particular employment practice that caused a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.

This case also involves Rule 23(a) of the Federal Rules of Civil Procedure:

> **(a) Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class (3) the claims or defenses of the representative party are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

STATEMENT

The original plaintiff, Charles Robinson, invoked the jurisdiction of the district court under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, alleging that respondent Sheriff of Cook County was discriminating against African-American applicants in hiring correctional officers. Robinson filed suit after receiving his "notice of right to sue" on his charge of employment discrimination in which he had alleged, *inter alia,* that respondent had "failed and refused [to hire] me and other black persons as correctional officers in proportion to their representation in the pool of persons certified for employment."

The Sheriff of Cook County hires correctional officers from among those "certified" by the Cook County Sheriff's Merit Board. From May 27, 1992 to December 29, 1994, the Sheriff hired 53% of the non-African-American candidates, as opposed to 34% of the African-American candidates. The Sheriff was also quicker to hire non-African-Americans: From May 27, 1992 to December 29, 1994, the median time between date of certification and date of hire for non-African-Americans was 118 days, as compared to 313 days for African-Americans.

Petitioner alleged that the disparity in hiring rates made out a *prima facie* case of disparate impact discrimination under Title VII of the Civil Rights Act of 1964.[1]

Petitioner Robinson asked the district court to allow the case to proceed as a class action under Federal Rule of Civil Procedure 23(b)(2) for "all African-Americans who, after having been certified as eligible for appointment to the Cook County Department of Corrections Officer as a Correctional Officer on and after December 28, 1990, were not so hired." The district court refused to allow the case to proceed as a class action, concluding that respondent's claim that he had failed to hire petitioner because of a poor work history made petitioner's claims atypical under Rule 23(a) of the Federal Rules of Civil Procedure. (Pet.App. 14.) The district court invited joinder by other members of the putative class (Pet.App. 9.) but refused to permit petitioner Belinda Taylor to serve as class representative because she had not filed an EEOC charge. (Pet.App. 14.) For the same reason, the district court held that Taylor could not pursue her individual claim in this litigation.

The district court conducted a trial limited to the question of whether, assuming that Robinson had established a *prima facie* case of disparate impact discrimination, respondent could show that petitioner Robinson had been rejected

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1. The Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §1607, recommend a finding of disparate impact when a facially neutral standard results in a "selection rate for any sex, race or ethnic group which is less than four-fifths (or eighty percent) of the rate for the group with the highest selection rate." 29 C.F.R. §1607.4. Here, the selection rate for African-American candidates was 64% of the selection rate for non-African-American candidates.

for a compelling business reason. (Pet.App. 2.) Respondent presented testimony from its former director of personnel that she had rejected Robinson because of his poor employment history. The district court accepted this explanation and found against petitioner Robinson.

On appeal, the Seventh Circuit upheld the denial of class certification (Pet.App. 4-5) concluding that Robinson could not be a class representative because his claim was "a loser from the start." (Pet.App. 4.) The Court of Appeals approved the district court's conclusion that Taylor could neither litigate her individual claim nor serve as a class representative because she had not filed her own EEOC charge. (Pet.App. 5.) The Court of Appeals also affirmed the district court's finding in favor of respondent on petitioner Robinson's individual claim. (Pet.App. 6.)

REASONS FOR GRANTING THE WRIT

-I-

The decision of the Seventh Circuit in this case that a person alleging discrimination in violation of Title VII may not join in a timely filed civil action unless she had filed her own charge of employment discrimination with the EEOC is in conflict with uniform decisions in the Second, Third, Fifth, Sixth, Eighth, Eleventh and District of Columbia Circuits which have interpreted prior decisions of this Court to fashion a "single filing" or "piggy-back" rule.

The "single-filing rule" is that an employment discrimination plaintiff may rely on a single filing "provided that '(1) the relied upon charge [to which he (or she) is piggybacking] is not invalid, and (2) the individual claims of the filing and non-filing plaintiff [the named filing plaintiff and the piggybacking plaintiff] arise out of similar discriminatory treatment in the same time frame.'" *Grayson v. K-Mart,* 79 F.3d 1086, 1102 (11th Cir. 1996), quoting *Calloway v. Partners National Health Plans,* 986 F.2d 446, 450 (11th Cir. 1993) "A party who has not filed an administrative charge

with the EEOC may still join a suit by 'piggybacking' on the administrative charge of one already a party to the suit." *Shempert v. Harwick Chemical Corp.*, 151 F.3d 793, 799 (8th Cir. 1998).

The "single-filing rule" is also applied in non-class action cases: "[I]n a multiple-plaintiff, non-class action suit, if one plaintiff has filed a timely EEOC complaint as to that plaintiff's individual claim, then co-plaintiffs with individual claims arising out of similar discriminatory treatment in the same time frame need not have satisfied the filing requirement." *Jackson v. Seaboard Coast Line R.R.*, 678 F.2d 992, 1011 (11th Cir. 1982).

The "single filing rule" is derived from the decision of this Court in *Albemarle Paper Co. v. Moody*, 414 U.S. 405, 414 n.8 (1975), where the Court held that "backpay may be awarded on a class basis under Title VII without exhaustion of administrative procedures by the unnamed class members." The Court applied this principle in *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 771 (1976) and again in *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977).

The Seventh Circuit acknowledged the "single filing rule" but held that it only applied when "a Title VII class action is up and running." (Pet.App. 5.) This distinction is contrary to *United Airlines, Inc. v. McDonald*, *supra*, where class certification had been denied and a member of the putative class was permitted to intervene after judgment as the class representative, even though she had not filed her own EEOC charge. 432 U.S. at 389. This distinction is also at odds with decisions in other circuits allowing intervention by

persons who had not filed EEOC charges in cases where class certification was neither "up" nor "running."[2]

Outside of the Seventh Circuit, the uniform view is that

> It would be wasteful, if not in vain, for numerous employees, all with same grievance, to have to process many identical complaints with EEOC. If it is impossible to reach a settlement with one discriminatee, what reason would there be to assume that the next one would be successful.

Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 498 (5th Cir. 1968).

Certiorari should be granted to resolve the conflict about the existence and applicability of the "single filing rule."

-II-

The decision of the Seventh Circuit that class certification may be denied because the individual plaintiff's claim "is a loser" (Pet.App. 4) rewrites Federal Rule of Civil Procedure 23 and is contrary to prior decisions of this Court.

In *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1978), the Court recognized that when a plaintiff files a case as a class action, he (or she) brings before the district

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2. *See, e.g., Snell v. Suffolk County*, 782 F.2d 1094, 1100 (2d Cir. 1986); *Lusardi v. Lechner*, 855 F.2d 1062, 1078 (3d Cir. 1988); *Wheeler v. American Home Products Corp.*, 582 F.2d 891, 897 (5th Cir. 1977); *EEOC v. Wilson Metal Casket Co.*, 24 F.3d 836, 840 (6th Cir. 1994); *Allen v. Amalgamated Transit Union Local 788*, 554 F.2d 876, 883 (8th Cir. 1977); *Ezell v. Mobile Housing Brd.*, 709 F.2d 1376, 1381 (11th Cir. 1983); *Foster v. Gueory*, 655 F.2d 1319, 1323 (D.C.Cir. 1981).

court his (or her) individual claim as well as "the claim that he is entitled to represent a class." Id. at 402. The Court in *Eisen* declined to establish any rule other than that set out in Rule 23(a) to determine whether a plaintiff whose individual claim for relief had expired could fairly and adequately represent the proposed class. Id. at 406.

In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), the Court held that there is "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." Id. at 177. The Court quoted *Miller v. Mackey International*, 452 F.2d 424, 427 (5th Cir. 1971) for the proposition that "[i]n determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met."

The decision of the Court of appeals to uphold denial of class certification because the named plaintiff's claim is "a loser" is flatly at odds with Rule 23 as interpreted by this Court in *Eisen*.

A plaintiff's claim may not be typical of that asserted for the class when, because of the plaintiff's "unique situation," a major focus of the litigation will be upon a "a defense unique to him." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir. 1992). But in this case, there was neither a showing nor a finding that the poor work history defense to plaintiff's claim was unique. Once petitioner established his *prima facie* case, respondent's burden would be to show a legitimate basis for rejecting nearly seventy percent of the African-American applicants as compared to fifty percent of the non-African-American applicants. It would not be surprising if respondent advanced the "poor work history" defense to explain its disparate hiring practices. Whether or not this defense could overcome a *prima facie* statistical is not relevant to class

certification.

In *Bazemore v. Friday,* 478 U.S. 385, 405 (1986), the Court rejected a wooden application of the typicality requirement of Rule 23. Certiorari should be granted in this case to correct an equally erroneous redefinition of "typicality."

-III-

The district court adjudicated petitioner Robinson's individual claim of discrimination in a manner analogous to that established by the Court for resolving claims of racially discriminatory use of peremptory challenges. *Purkett v. Elem,* 514 U.S. 765 (1995). Respondent introduced evidence that petitioner had been rejected because of a gap in his employment history; respondent did not introduce any other evidence to explain the statistical disparity in hiring rates between African-American and non-African-American applicants. In the view of the district court, respondent's evidence established that Robinson had been rejected for a non-discriminatory reason.

Under *Teamsters v. United States,* 431 U.S. 324 (1977), once the plaintiff has established a case of disparate impact discrimination, the burden "rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful means." 431 U.S. at 362. The employer should be required to do more to meet this burden than merely articulating a non-discriminatory reason for its employment decision.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

June, 1999

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